No. 11,798

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PUEBLO TRADING CO. (a corporation),
Appellant,

vs.

EL CAMINO IRRIGATION DISTRICT (a public corporation); B. A. OSBORN, S. E. AYER, J. P. BURTON, WALTER MAYES and WALTER BUNTING, Members of the Board of Supervisors of Tehama County, and W. E. ROCHFORD, Assessor of Tehama County, California,
Appellees.

APPELLANT'S PETITION FOR A REHEARING.

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant respectfully petitions this Court for a rehearing on this appeal on the following ground:

It is respectfully submitted that both this Court, in its majority opinion, and the District Court, in its order dismissing the contempt proceeding, failed to

consider or mention appellant's plea for execution of the money judgment by way of ancillary mandamus.

ARGUMENT.

The dissenting opinion of Judge Denman admirably states our position.

In the original order to show cause below, in the briefs of both parties on appeal, in the oral argument before this Court, and in the dissenting opinion filed herein, two separate issues were recognized: (1) Were the public officers subject to contempt for failure to make the levy as directed in the default judgment? And (2) Should the Court order them to show cause why a levy and collection of assessments to satisfy the judgment ought not be made?

This Court is unanimous in upholding the Court below for dismissing the contempt proceeding, and appellant does not direct this petition for rehearing to that first issue which must be considered settled. However, appellant does desire to have this Court consider and rule on the second issue before it.

Appellant's primary purpose is to enforce collection of the money judgment obtained on its bonds, not to punish the County of Tehama officials for contempt. However, both Courts in their opinions fully discussed the relatively minor contempt issue and were silent on the point of greater importance.

In considering the second portion of the order it is pointed out that the respondents are parties to the proceeding, and that they have had their day in Court

and been heard. In appearing they set forth claims of equitable defenses but at the hearing put in no testimony to support their position.

There is no substantial difference between the proceedings taken in the instant case and in the case of *Board of Supervisors of Riverside County v. Thompson,* 122 Fed. 860, decided by this Court.

What the Court's opinion in the instant case amounts to is a declaration that unless all the officers of a public agency are made parties in the original complaint, they cannot afterwards be compelled to execute the judgment, yet it has never been the practice to make such officials parties.

WHAT THE RECORD AND BRIEFS SHOW.

That the Order to Show Cause which was served on appellees contained two parts is clearly shown by reading it. This Order provided (R. 12):

> "It is Ordered that the said Board of Supervisors and officers of Tehama County * * * and Assessor of Tehama County, show cause before this court * * * why they and each of them should not be punished for contempt of court for disobedience of the judgment made and entered herein on the 13th day of February, 1945, and why such *further order* in the premises should not be made as will insure the levy and collection of assessments for the satisfaction of the judgment herein." (Emphasis ours.)

In the Brief for Appellant (p. 30) the following point was raised: "The Court Erred in Not Regard-

ing Its Order to Show Cause as Process Under Rule 81 (b) of Federal Rules of Civil Procedure." And on the following page:

> "The Court should, if it was correct in dismissing the contempt proceedings, have construed the order to show cause as a proceeding under Rule 81 (b) of the Federal Rules of Civil Procedure and proceeded to require the levy of the assessment. This rule reads as follows:
>
> > 'The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.'
>
> "The Court's decision that it had no jurisdiction to proceed in the matter amounted to a declaration that the rule in question was unconstitutional as applied to the situation here."

And it was further pointed out by appellant on page 32 of its brief before this Court:

> "It would therefore appear that unless the relief sought in this case is granted the appellant will be denied the equal protection of the laws and the Courts for satisfaction and protection of its interests, that its property will be substantially taken from it without due process of law. Furthermore ample notice had been given to the appellees of the proceedings and we submit the Court should have entered an order requiring them to levy an assessment if it did not choose to hold them guilty of contempt."

Judge Denman in his dissenting opinion (page 2) recognized the two issues:

> "On the appeal here it was agreed that there were two matters before the lower court, one for the past contempt decided by the above order and another for future action, the mandamus proceeding for execution of the judgment in favor of the bondholder."

He also set out portions of appellees' brief showing that they recognized the "difference between the contempt portion and the mandamus portion of the relief sought by the hondholder."

Footnote 2 of the majority opinion of this Court reads:

> "Appellant's petition stated but one cause, namely, for peremptory relief predicated on an asserted contempt. We have not considered and do not decide what other form of relief, if any, appellant may be entitled to."

CONCLUSION.

It is respectfully submitted that the Court has failed to consider the important issue of this appeal and that a rehearing is proper under such circumstances.

Dated, Turlock, California,
August 24, 1948.

Respectfully submitted,
W. COBURN COOK,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

Dated, Turlock, California,
August 24, 1948.

W. COBURN COOK,
Attorney for Appellant and Petitioner.